

haynesboone

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August 28, 2013

By ECF and By Hand Delivery

Honorable Richard M. Berman
United States District Court
Southern District of New York
500 Pearl Street, Courtroom 12D
New York, New York 10007

***Re: Hershkowitz v. Think Tech Labs, LLC, et al.
(13-CIV-5564) (RMB)***

Dear Judge Berman:

We represent Think Tech Labs, LLC (“Think Tech”) and Vijay Mehra (“Mehra”), defendants in the above-referenced matter. This responds to plaintiff’s August 21, 2013 letter requesting a pre-motion conference to address plaintiff’s anticipated motion to remand this action to the Supreme Court of the State of New York, County of New York.

This action was properly removed on August 9, 2013 -- 30 days after service was effectuated on defendants (through defendants’ counsel’s acceptance of service).

According to plaintiff’s counsel, they first attempted to serve Think Tech on June 7, 2013 via the New York Secretary of State. Thereafter, on June 19, plaintiff’s counsel e-mailed a copy of the complaint to Mehra and his father. (Plaintiff purportedly made other failed attempts at personal service on defendant Mehra).

Defendants were not properly served until July 10, 2013, when counsel for defendants accepted service of the complaint on defendants’ behalf. (See July 10, 2013 e-mail, attached as

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Exhibit A.) Plaintiff's counsel confirmed that July 10, 2013 was the operative date for service.

(*See* July 29, 2013 e-mail, attached as Exhibit B.)

In his letter, plaintiff's counsel misleadingly refers to defendants as a single entity. There are two distinct defendants and the removal statute provides that: "*Each defendant* shall have 30 days after receipt by or service on that defendant of the initial pleading . . . to file the notice of removal." 28 U.S.C. § 1446(b)(2)(B) (emphasis added); *see also Pietrangelo v. Alvas Corp.*, 686 F.3d 62, 64-65 (2d Cir. 2012) ("each defendant get[s] his own thirty days to remove after being served."). Proper service is required for the 30-day clock for removal to be triggered. *See, e.g., Tsitrin v. Jacobs*, 12 Civ. 1411, 2012 U.S. Dist. LEXIS 53211, at *4-8 (S.D.N.Y. April 9, 2012) ("Formal service of process . . . is required before this thirty-day period will begin to run.").

Based on the facts noted above, prior to defense counsel's agreement to accept service on July 10, neither defendant was properly served. The purported service noted by plaintiff was inadequate because: (i) Think Tech could not be served via the New York Secretary of State because it is not registered to do business in New York¹; and (ii) service by e-mail is insufficient. *See, e.g., Demitro v. Garsan Reality, Inc.*, 14425/2005, 2009 N.Y. Misc. LEXIS 1584, at *5

¹ New York Limited Liability Company law provides that service of process may be made "on the secretary of state as agent of a domestic limited liability company or authorized foreign limited liability company." N.Y.L.L.C. § 303(a). New York law does *not* provide for service of process on the Secretary of State for non-domestic and/or non-authorized foreign limited liability companies, such as Think Tech.

Even assuming *arguendo*, that service on the Secretary of State was somehow proper, the Affidavit of Service filed by plaintiff does not reflect Think Tech's correct mailing address.

Furthermore, to the extent plaintiff alleges service pursuant to N.Y.L.L.C. § 304, such service was similarly defective.

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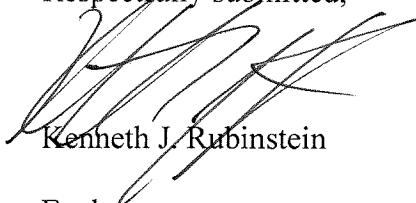
(Sup. Ct., Bronx County Apr. 24, 2009); *TAGC Mgmt., LLC v. Lehman*, 842 F. Supp. 2d 575, 584 (S.D.N.Y. 2012); *Citigroup Global Mkts. Inc. v. Stavros Oscar CID*, 654211/12, 2013 N.Y. Misc. LEXIS 3052, at *2-3 (Sup. Ct., N.Y. County July 11, 2013).

Plaintiff's other alleged attempts at service were equally inadequate. (Indeed, plaintiff does not allege that any other attempts were successful).² Accordingly, the 30-day clock for removal began on July 10.

Plaintiff's contention that "it is well-understood that a defendant who . . . willfully and deliberately evades, avoids, or refuses to accept service is legally estopped from opposing a motion to remand" is spurious. No such estoppel rule exists and the case law on which plaintiff relies in its letter is inapposite. In any event, there was never any attempt by either defendant to "purposefully evade" service.

Based on the foregoing, removal was proper and plaintiff's anticipated remand motion is without merit. Thank you for your consideration.

Respectfully submitted,



Kenheth J. Rubinstein

Encl.

cc: Joseph A. Piesco, Jr., Esq.

²

Contrary to plaintiff's assertion, neither defendant maintains an office at Keller Williams Realty.

EXHIBIT A

Rubinstein, Ken

From: Rubinstein, Ken
Sent: Wednesday, July 10, 2013 5:19 PM
To: 'Julia C. DiPrete'
Cc: Joseph A. Piesco, Jr.
Subject: RE: Warren Hershkowitz v. Think Tech Labs and Vijay Mehra

Thank you Julia. I confirm that I have accepted service of the Summons and Complaint on behalf of each defendant as of today's date.

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Kenneth J. Rubinstein
Partner
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From: Julia C. DiPrete [<mailto:jdiprete@kasowitz.com>]
Sent: Wednesday, July 10, 2013 5:07 PM
To: Rubinstein, Ken
Cc: Joseph A. Piesco, Jr.
Subject: Warren Hershkowitz v. Think Tech Labs and Vijay Mehra

Ken, this is to confirm that you have agreed to accept service on behalf of Think Tech and Vijay Mehra. Attached please find PDFs of the summons and complaint, as well as the exhibits to the complaint. I will prepare a FedEx package with hard copies of same. I will also send you the relevant email exchanges as we discussed.

Regards,
Julia

Julia C. DiPrete
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1633 Broadway
New York, New York 10019
Tel. (212) 506-1927
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jdiprete@kasowitz.com

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EXHIBIT B

Rubinstein, Ken

From: Julia C. DiPrete <jdiprete@kasowitz.com>
Sent: Monday, July 29, 2013 5:39 PM
To: Rubinstein, Ken
Cc: Joseph A. Piesco, Jr.
Subject: RE: Warren Hershkowitz v. Think Tech Labs and Vijay Mehra

Thank you Ken. We will confirm August 12.

Regards,
Julia

Julia C. DiPrete
Kasowitz, Benson, Torres & Friedman LLP
1633 Broadway
New York, New York 10019
Tel. (212) 506-1927
Fax (212) 500-3443
jdiprete@kasowitz.com

From: Rubinstein, Ken [mailto:Ken.Rubinstein@haynesboone.com]
Sent: Monday, July 29, 2013 12:32 PM
To: Julia C. DiPrete
Cc: Joseph A. Piesco, Jr.
Subject: RE: Warren Hershkowitz v. Think Tech Labs and Vijay Mehra

Service confirmation (noted below) of July 10; not personally served within state. Actual response date is August 11 (which is a Sunday) so it is August 12.

From: Julia C. DiPrete [mailto:jdiprete@kasowitz.com]
Sent: Monday, July 29, 2013 12:26 PM
To: Rubinstein, Ken
Cc: Joseph A. Piesco, Jr.
Subject: RE: Warren Hershkowitz v. Think Tech Labs and Vijay Mehra

Ken,

According to our calendar, defendants' last day to respond is July 30. Please let us know how you arrived at the August 9 date. Thank you.

Regards,
Julia

Julia C. DiPrete
Kasowitz, Benson, Torres & Friedman LLP
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New York, New York 10019
Tel. (212) 506-1927
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jdiprete@kasowitz.com

From: Rubinstein, Ken [<mailto:Ken.Rubinstein@haynesboone.com>]
Sent: Monday, July 29, 2013 10:15 AM
To: Julia C. DiPrete
Cc: Joseph A. Piesco, Jr.
Subject: RE: Warren Hershkowitz v. Think Tech Labs and Vijay Mehra

Julia: Confirming that date by which defendants have to respond to the complaint is August 9.

From: Rubinstein, Ken
Sent: Wednesday, July 10, 2013 5:19 PM
To: 'Julia C. DiPrete'
Cc: Joseph A. Piesco, Jr.
Subject: RE: Warren Hershkowitz v. Think Tech Labs and Vijay Mehra

Thank you Julia. I confirm that I have accepted service of the Summons and Complaint on behalf of each defendant as of today's date.

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Ken, this is to confirm that you have agreed to accept service on behalf of Think Tech and Vijay Mehra. Attached please find PDFs of the summons and complaint, as well as the exhibits to the complaint. I will prepare a FedEx package with hard copies of same. I will also send you the relevant email exchanges as we discussed.

Regards,
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